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In the Supreme Court of the United States

OCTOBER TERM, 1990

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,
PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondents challenge an interpretation of Section 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536(a)(2), that is set forth in a regulation issued by the Secretary of the Interior. We explain in the certiorari petition (at 13-20) that respondents fail to satisfy the bedrock standing requirements of Article III of the Constitution, and that the court of appeals' holding to the contrary squarely conflicts with decisions of this Court and other courts of appeals. We also explain (Pet. 20-29) that the court of appeals' holding that Section 7(a)(2) of the ESA applies to actions in foreign countries is contrary to the presumption against extraterritorial application of federal statutes, disregards the principle of deference to the administrative interpretation, and is unsupported by the text and legislative history of the ESA. The error on the merits now is especially clear in light of *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227

(1991), which held that Title VII of the Civil Rights Act of 1964 does not apply to the conduct of American employers in foreign countries. Respondents have offered no persuasive defense of the standing and extraterritoriality rulings by the court below and no persuasive reason why this Court should decline to consider these important issues.

A. As they did in the courts below, respondents have wholly failed to establish their standing—in the abstract setting of this case—to challenge the Secretary's interpretation of Section 7(a)(2).

1. The court of appeals held that the respondent environmental organizations have standing in their own right to challenge the statutory interpretation set forth in the regulation at issue, based on the supposed "procedural" injury they will suffer if federal agencies do not consult with one another about the impact of projects in foreign countries. This is so, the court held, even if respondents' members have no geographical nexus to the site of any such overseas project and therefore will not suffer the sort of concrete environmental (or other) injury that is necessary to satisfy Article III standing requirements. Pet. App. 10a-11a, 42a-44a. We have pointed out (Pet. 18) that there is no support in the text or legislative history for the notion that Section 7(a)(2) confers "procedural" rights on environmental organizations, especially since it provides for consultation solely between federal agencies, without any mechanism for public input. We also have explained (Pet. 13, 18-19) that organizations like respondents could not in any event establish Article III standing unless they showed that they (or their members) have some concrete stake in the matter that is distinct from whatever interest they might assert in having a federal agency adhere to alleged "procedural" requirements, because "[t]his Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen* v. *Wright*, 468

U.S. 737, 754 (1984) (citing *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974), and *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982)).

Respondents make no effort to rebut our submission that neither the ESA nor Article III supports the "procedural injury" theory of standing adopted by the court of appeals. Nor do respondents deny that the court of appeals' holding in this respect squarely conflicts not only with the decisions of this Court cited above, but also with the decisions of three other courts of appeals that have limited the "procedural injury" theory of standing to a litigant "having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences that the project may have." *City of Los Angeles* v. *NHTSA*, 912 F.2d 478, 492-493 (D.C. Cir. 1990) (quoting *City of Davis* v. *Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)); see Pet. 18 (citing cases); Br. in Opp. 20 n.4. Respondents therefore have effectively conceded that the decision below warrants review.

2. Respondents do attempt (Br. in Opp. 15-21) to defend the court of appeals' alternative holding that respondent Defenders of Wildlife has standing on the basis of injury allegedly suffered by two of its members.[1] Congress has not enacted any statutory provision authorizing a person to bring an immediate challenge to an interpretative regulation issued by the Secretary of the Interior to guide other federal agencies in the performance of

[1] Respondents contend (Br. in Opp. 20 n.4) that any error by the court of appeals on the "procedural injury" theory is "irrelevant" because the court found that two of Defenders' members have standing. As we explain in the text, the latter ruling is erroneous as well. In any event, the existence of an alternative holding below does not detract from the precedential effect of the Eighth Circuit's "procedural injury" holding, and it therefore does not eliminate the circuit conflict or reduce the substantial likelihood that the decision below will invite future suits based on hypothetical "procedural" harm, divorced from concrete injury.

their duties under the ESA. Respondents' suit therefore must arise solely under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* See Pet. 19 n.6. An APA challenge to a regulation ordinarily is not ripe until the factual components of the controversy have been fleshed out by some concrete application of the regulation to the plaintiff's situation in a manner that harms or threatens to harm him. *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3190 (1990).

Here, respondents focus (Br. in Opp. 17-19) on two projects abroad, the Mahaweli Project in Sri Lanka and the rehabilitation of the Aswan High Dam in Egypt, each of which lies within an area that was once visited by a member of respondent Defenders of Wildlife. This suit, however, does not challenge the legality of any assistance furnished by the United States to those two projects or seek to terminate that assistance. Respondents instead challenge the Secretary's non-binding rule interpreting the geographic scope of Section 7(a)(2) as a general matter.[2] Respondents cite no support for their assertion (Br. in Opp. 15) that the Mahaweli and Aswan Projects have been "adversely affected by the rule." Both were begun—and Defenders' members visited the areas in which the projects are located—before the rule was issued.

Undaunted, respondents insist that they have standing because they fear that possible *future* visits to the project

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[2] Respondents misunderstand (Br. in Opp. 6 n.1, 21 n.5) the significance of our observation (Pet. 16) that the action agencies, not the Secretary, are ultimately responsible for determining what is required of them under Section 7(a)(2). We do not suggest that where Section 7(a)(2) applies, action agencies may simply ignore either their duty to consult or the results of consultation. Our point, rather, is that the federal agency responsible for a project "makes the ultimate decision as to whether its proposed actions will satisfy the requirements of section 7(a)(2)." 51 Fed. Reg. 19,928 (1986). As this Court recognized in *TVA* v. *Hill*, 437 U.S. 153, 186 n.31 (1978), the action agency may make a final decision "notwithstanding contrary advice from the Secretary of the Interior"—subject, of course, to judicial review of *that* final decision, which respondents have not sought in this case.

sites by Defenders' two members may be less satisfactory if further assistance by United States agencies is not conditioned on compliance with Section 7(a)(2). But this allegation of "injury" rests on an unacceptably attenuated chain of speculation: that the current manner in which those two projects are being carried out will actually harm endangered or threatened species (a charge that respondents have never substantiated (see Pet. 14-15)); that a revision of the interpretation embodied in the Secretary's non-binding regulation would cause the responsible action agencies to shift course; that the action agencies, after consultation, would conclude that protected species would be adversely affected by the projects as now conceived; that the action agencies would then convince the foreign governments concerned to alter the projects in a way that would mitigate the adverse effect; and that the two members of Defenders in fact would visit the project sites in the future and benefit from any incremental abundance of the species that could be attributed to the operation of Section 7(a)(2). If standing were allowed to rest on such a chain of inferences (involving independent decisions by other agencies and foreign governments not before the court), the requirements of injury-in-fact, traceability, and redressability would be rendered virtually meaningless, contrary to *Allen* v. *Wright*, 468 U.S. at 757, and *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). The seriously erroneous decision below on standing therefore warrants review by this Court.[3]

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[3] Respondents note (Br. in Opp. 19) that although the Secretary challenged respondents' standing on traceability and redressability grounds on the first appeal to the Eighth Circuit, he did not renew that challenge on the second appeal. However, issues resolved on the prior appeal may be raised in this Court in a certiorari petition seeking review of the court of appeals' judgment on the second appeal. *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955); *Falk* v. *Brennan*, 414 U.S. 190, 194 n.7 (1973); *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 817-818 (1988).

B. On the merits, respondents have fallen far short of demonstrating the "affirmative," "clearly expressed," and unambiguous congressional intent necessary to overcome the presumption against applying an Act of Congress to activities in foreign countries. See *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. at 1230-1231.

1. Respondents go so far as to suggest (Br. in Opp. 8, 27-28 & n.7) that the presumption against extraterritoriality is not even triggered here because Section 7 of the ESA, 16 U.S.C. 1536, applies only to the "planning" activities of federal agencies in the United States. It is clear, however, that respondents are attempting to "extend the protections of [the Act] beyond our territorial borders." 111 S. Ct. at 1231. Although respondents repeatedly try to convey the impression (Br. in Opp. 2, 6, 7, 8, 9, 10, 11, 15, 17, 18, 19, 20, 21, 22, 24, 26) that they seek only to compel the Secretary to adopt an interpretation of Section 7(a)(2) that does no more than require federal agencies to "consult" about projects in foreign countries, consultation is merely ancillary to Section 7(a)(2)'s substantive requirement: that each federal agency assure, "in consultation with and with the assistance of the Secretary," that any action it authorizes, funds, or carries out "is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation with the affected States, to be critical" (unless the agency has been granted an exemption). Thus, respondents necessarily are seeking to apply Section 7(a)(2)'s *substantive* requirements to activities within a foreign country. Indeed, respondents' standing to sue must rest on asserted harm to species in Egypt and Sri Lanka that allegedly would result from projects being carried out by the governments of those countries within their borders. See pages 4-5, *supra*. Accordingly, the presumption that Congress "is primarily concerned

with domestic conditions," *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949), is fully applicable to this case.[4]

2. In seeking to overcome the presumption, respondents focus (Br. in Opp. 21-22) on the references in Section 7(a)(2) to "any action" and "any endangered species"—from which respondents infer that Section 7 must apply to actions of the United States Government throughout the world. But even the court of appeals recognized that merely inclusive language of a general nature such as "any" does not rebut the presumption against extraterritorial application, Pet. App. 12a-13a (citing *Foley Bros.* v. *Filardo*, 336 U.S. at 287-288), and in *EEOC* v. *Arabian American Oil Co.*, the Court similarly declined to sustain an extraterritorial application of United States law on the basis of broad and general language defining the terms "employer" and "commerce." 111 S. Ct. at 1231-1232.[5]

Respondents point out (Br. in Opp. 5, 21-22, 24-25) that Section 4 of the Act, 16 U.S.C. 1533, requires the

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[4] By the same token, respondents are incorrect in arguing that the regulations make consultation "unavailable" (Br. in Opp. 2) with respect to overseas projects. The regulations express the Secretary's view that consultation is not required by the Act, but they in no way preclude voluntary consultation of the sort that occurred with respect to the Mahaweli Project. See Pet. 15.

[5] Respondents' focus on the phrase "any endangered species" in Section 7(a)(2) is misplaced for an additional reason. The answer to the extraterritoriality question in this case hinges on the meaning of the phrase "any action" in Section 7(a)(2). The regulation at issue interprets that phrase to encompass only agency actions "in the United States or upon the high seas," but recognizes that the protection of Section 7(a)(2) applies wherever such actions would affect "any listed species." 50 C.F.R. 402.01. Thus, the regulation indicates that Section 7(a)(2) *would* apply if an agency action in the United States or on the high seas would adversely affect a species in a foreign country—for instance, if the species is migrating or has been captured, or if the agency action has effects that spill over onto foreign soil. Respondents' repeated mischaracterization (Br. in Opp. 7, 8, 11, 12, 22, 26) of the regulation as focusing on the location of the wildlife, rather than of the agency action, simply confuses the issue.

Secretary to list species whose habitat is abroad as well as those whose habitat is in the United States. However, Section 4 undermines rather than supports respondents' position. It provides for listing species in foreign countries because of the need to designate which species will be protected by those provisions of the Act that are explicitly extraterritorial, such as the import restrictions in Section 9, 16 U.S.C. 1538, and the foreign assistance provisions of Section 8, 16 U.S.C. 1537. Section 4 therefore does not imply that *all* sections of the Act—and particularly Section 7(a)(2)—are extraterritorial in scope.

Respondents object (Br. in Opp. 24) that this interpretation "compartmentalize[s]" the Act into parts having different geographic applications, instead of reading the statute "as a whole" to apply to actions overseas. But practically in the same breadth, respondents recognize (Br. in Opp. 24-25) that Section 4(b)(1) (which governs listing of species) and Section 4(b)(2) (which governs designations of the critical habitats of listed species) do *not* have the same geographic scope, since they do not challenge tne Secretary's consistent interpretation of the latter not to apply to habitats in foreign countries. See Br. in Opp. 24-25. Moreover, as respondents concede (Br. in Opp. 28), Section 9 also draws geographical distinctions: while its prohibitions against commerce in endangered species apply to commerce within a foreign country, its prohibitions against taking of endangered species apply only within the United States and on the high seas. 16 U.S.C. 1538(a)(1); see § 3(9), 16 U.S.C. 1532(9). Respondents' contention that the overseas application of the ESA presents a unitary question based on the Act as a whole therefore cannot withstand analysis. Each provision of the Act must be considered individually.

3. Section 7, the proper focus of analysis here, does not contain the requisite "clear statement," *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. at 1235, that the duties it imposes apply to agency actions in foreign countries. Congress's failure in Section 7 "even to mention

foreign nations" or to "address[] the subject of conflicts with foreign laws and procedures," 111 S. Ct. at 1234, confirms that respondents have not rebutted the presumption against extraterritoriality. That conclusion is especially warranted here, since Congress prominently mentioned foreign nations and their concerns in other sections of the Act (see Pet. 26-27), but not in Section 7.

Indeed, as we have pointed out (Pet. 23-24), the only geographical reference in Section 7(a)(2) is to States, in the critical-habitat clause. Respondents apparently concede (Br. in Opp. 24-25) that that clause (which imposes a duty to avoid destruction or adverse modification of critical habitat)—like the requirement under Section 4(b)(2) to designate critical habitat in the first place—does not apply in foreign countries. But they cannot explain why Congress would have given a radically different geographical scope to two duties set forth in the same sentence of Section 7(a)(2): the duties to avoid jeopardy to endangered species and to avoid adverse modification of critical habitat of such species. The conclusion that Congress did not draw any such distinction is evident from the domestic focus of the provisions in subsections (e)-(p) of Section 7 for exempting an agency action from the rigid requirements of the very "no-jeopardy" clause of Section 7(a)(2) at issue here. See Pet. 24-25.[6]

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[6] Respondents assert (Br. in Opp. 23) that the Conference Committee on the 1978 amendments indicated a desire to retain the Secretary's initial interpretation that Section 7 applies to agency actions in foreign countries. But respondents cite no evidence that this interpretation was brought to the Committee's attention, let alone that it was approved by the Committee (or Congress as a whole). As we have pointed out (Pet. 28), the Committee was not focusing on the extraterritoriality question at all; it was instead considering whether to retain a statutory framework that was familiar to federal agencies and had been incorporated into regulations. The court of appeals' reference to "extensive commentary made by numerous agencies on the issue [of extraterritoriality]" (Pet. App. 17a), cited by respondents (Br. in Opp. 23), apparently was to comments submitted to the Interior Department in response

4. We have explained (Pet. 4, 12, 20-22, 28-29) that the ruling below will impose substantial burdens on the conduct of United States activities in foreign countries, including diplomacy and defense, and threatens interference with the Executive Branch's conduct of foreign affairs. Respondents' only reply (Br. in Opp. 2)—that the record in this case does not demonstrate any unacceptable burdens—is disingenuous. If respondents had brought this suit as a challenge to a specific United States-assisted project in a foreign country, the adverse foreign-relations and other implications of a judicial application of domestic environmental standards to a project undertaken by a foreign government would have been apparent. By instead bringing this case as an abstract challenge to advisory regulations, respondents have sought to prevent the real-world implications of their expansive reading of Section 7 from being fleshed out in the context of a concrete controversy. But those implications are both real and serious, and merit this Court's review, especially when coupled with the court of appeals' unprecedented and fundamentally erroneous holdings on standing.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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to its initial interpretation (see Pet. 3). There is no evidence that similar comments were presented to Congress.

Nor is there force in respondents' argument (Br. in Opp. 23 n.6) that "plenty of floor statements recogniz[ed] the worldwide scope of the Endangered Species Act." Congress clearly intended that *some* parts of the Act would have an effect overseas. As we have shown (Pet. 27-28), however, when Members of Congress focused on Section 7, they spoke only in terms of its domestic application.

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